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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 10 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Policies and Rules Regarding
Minority and Female Ownership of
Mass Media Facilities

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)
) MM Docket No. 94-149

)
) MM Docket No. ~~94-140~~
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91-140

REPLY COMMENTS OF

NOW Legal Defense and Education Fund

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NOW Legal Defense and Education Fund¹ (NOW LDEF) endorse the Reply Comments filed by Black Citizens for a Fair Media, et al., in response to the Commission's Notice of Proposed Rule making, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 94-149 and 91-140, FCC 94-323 (released January 12, 1995). NOW LDEF files this brief separate statement elucidating the implications of the recent Supreme Court decision in Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. (June 12, 1995) on governmentally-imposed gender based classifications.

Adarand did not address the constitutional standard of review for affirmative action programs that use gender

¹ NOW Legal Defense Fund and Education Fund is a non-profit public interest law firm committed to securing and protecting women's right to be free from discrimination. Founded in 1970 by members of the National Organization of Women, NOW LDEF is an independent organization that has, for 25 years, used litigation, legislation and public education to promote women's equality. Since its inception, women's involvement in media and communications have been particular concerns of NOW LDEF. Among other things, in the 1980's, NOW LDEF's Media Project campaigned for greater representation of women in media outlets; currently, NOW LDEF monitors and, when necessary, initiates litigation, to ensure women's access to "non-traditional" employment.

classifications as a basis for decisionmaking, except to briefly clarify that such classifications would continue to be subject to intermediate scrutiny.² Adarand, 63 U.S.L.W. at 4536 (Stevens, J., dissent). Use of intermediate scrutiny for gender based classifications has a host of support in both prior Supreme Court and Circuit Court decisions. See Metro Broadcasting v. FCC, 497 U.S. 547, 565 (1990); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); See also, Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579-80 (11th Cir. 1994); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1009-10 (3d Cir. 1993); Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992) (Thomas, J.); Coral Constr. Co. v. King County, 941 F.2d 910, 930-31 (9th Cir. 1991); Associated Gen. Contractors v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987). Therefore, FCC implementation of an incubator program on behalf of women as proposed by Black Citizens, et al., in their original comments need only meet intermediate scrutiny.

However, even if the incubator program for women were analyzed under strict scrutiny, it would pass constitutional muster because implementation of an incubator program for women is narrowly tailored to remedy past discrimination against women

² Intermediate scrutiny requires that the classification be enacted to achieve an important government interest, whose means are substantially related to the achievement of the government interest. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197-98 (1976).

in lending and to promote programming diversity for viewers and listeners overall.³

For the reasons discussed in the Reply Comments filed by Black Citizens et al., remedying past discrimination in lending is a compelling government interest. See Black Citizens et al., Reply Comments at 4-6 dated July 10, 1995 [hereinafter Reply Comments]. Like minorities, women are largely underrepresented as owners of mass media facilities, holding ownership interests in only 7.1% of all broadcast stations last surveyed by the Congressional Research Service in 1988.⁴ Discrimination by lending institutions against women also greatly contributes to their low ownership of broadcast facilities. See Black Citizens for A Fair Media, et al., Initial Comments dated May 17, 1995 at 30-43 [hereinafter Comments] (discussing how women have relatively less personal wealth to invest than other small businesses and that financial institutions discriminate against women, even when their education and income are equal). Like minorities, until women can overcome the barriers they face in obtaining capital, they will not be able to participate in the telecommunications revolution. Therefore, encouraging and enabling all members of

³ A policy that satisfies strict scrutiny, necessarily satisfies intermediate scrutiny because a government purpose that is compelling is also important. Similarly, means that are narrowly tailored would also be substantially related to a particular goal.

⁴ Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? 12 (1988). More recent statistics on women-owned businesses are expected to be released by the Bureau of the Census in summer 1995.

society to participate in our national economy is a compelling governmental interest as it promotes economic opportunity and growth not just for women, but for the United States as a whole. Id. at 28 (discussing how women, by the year 2000, are expected to own 40 percent of all businesses, employing more workers than do all of the Fortune 500 companies combined)(citations omitted).

The government also has a compelling interest in increasing programming diversity for all viewers and listeners. See Reply Comments at 6-10. As discussed at length in the original Comments, there is a nexus between women's ownership of broadcast stations and diversity of programming.⁵ See Comments at 24-26. Like minority owners, women owners diversify programming by virtue of the topics they select, the perspectives they bring and their efforts to help improve the portrayal of women over the airways. See Comments at 14-24. Therefore, for the same reasons implementation of an incubator program on behalf of minorities is compelling, implementation of an incubator program will similarly promote ownership opportunities for women, thereby increasing

⁵ Congress has specifically found that expanding women ownership "results in diversity of programming and improved service to minorities and to women audiences," and has explicitly approved the use of preferences to help reach that goal. S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987)(quoted in Metro, 110 S. Ct. at 3016; see also Minority Ownership of Broadcast Stations: Hearing Before the Senate Comm. on Commerce, 101st Cong., 1st Sess. at 3 (1989)(statement of Sen. Hollings); 135 Cong. Rec. H 7644 (daily ed. Oct. 26, 1989) (banning expenditure of funds to weaken the policy); H.R. Rep. No. 97-765 Conf. Rep. 765, 97th Cong., 2d Sess. 43 (1982), reprinted in 1982 U.S.C.C.A.N. 228-89(permitting lotteries)(women "significantly underrepresented in license ownership; preferences needed to ensure "wider diversity of information sources").

programming diversity for listeners and viewers. See Reply Comments at 10-17.

Finally, for the reasons discussed in the Reply Comments, the most recently available data indicates that race- and gender-neutral alternatives have failed to significantly increase the ownership opportunities of minorities and women. Id. at 10-14. Thus, even if strict scrutiny were applied to an incubator program on behalf of women, the FCC has the authority to implement a program to increase ownership opportunities to redress past discrimination against women and to increase programming diversity. Moreover, the Commission has the flexibility to fashion an incubator program that would be narrowly tailored to address the government's compelling interests discussed above. Id. at 14-17.

Respectfully submitted,



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